



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE 418 OF 2014

EUNFRASIA MUKASIA KABANA.....CLAIMANT

VS

FACTORY GUARDS MOMBASA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for compensation and terminal dues arising from the alleged unlawful and unjustified termination of the claimant's employment contract by the respondent on 18.7.2013. It is the claimant's case that the reason for the dismissal was not explained to her in a language she understood. She however admits that the respondent's Sales Manager made frivolous allegation about an offence committed by her on 5.6.2013 and she was summoned to a disciplinary hearing on 15.7.2013 and after three days she was dismissed from employment. She thereafter appealed against the dismissal but the same was rejected.

2. The respondent admits that she had employed the claimant as a guardette on casual basis. It is the defence case that the claimant misconducted herself by behaving rudely to the Sales manager and by improper dressing while on duty. That she was given a disciplinary hearing after which she was only required to write an apology letter but she refused. She was dismissed and paid kshs.184,882 made up of Leave days, Gratuity, Overtime and House Allowance.

3. The suit was heard on 11.2.2015, 5.7.2015 and 18.2.2016 when the claimant testified as Cw1 while the defence called Mr. Peter Bwayo a guard, Mr. Pius Malombe a guard and the Chief steward and Mary Dzine Kambi, respondents HR Officer and RW1, RW2 and RW3 respectively. Thereafter both parties filed written submissions.

4. After careful consideration of the pleadings, evidence and the submissions presented to the court there is no dispute that: the claimant was employed by the respondent, she was charged with misconduct before a disciplinary hearing accorded to on 15.7.2013; she was found culpable by the disciplinary committee and she was asked to write an apology; she refused to apologise and she was dismissed; she was appealed unsuccessfully and she was paid her terminal dues amounting to kshs.184,882. The reason for determination are:

- a. **Whether the termination of the claimant's employment was unlawful and unjust.**
- b. **Whether reliefs sought should be granted.**

Unlawful and unjust dismissal

5. Cw1 has admitted both in her pleadings and testimony that on 15.7.2013 he was summoned to a disciplinary hearing where she was charged with the offence of failure to wear Nametag while on duty and also eating from the receptions area on 5.6.2013. In her view, she never saw anything wrong about the alleged offence and refused to write an apology as ordered by the disciplinary committee. The respondent has pleaded and adduced evidence to prove that in deed the claimant committed the said offences on 4.6.2013 and not 5.6.2013 as indicated in the dismissal letter. That according to the respondent the offence committed by the claimant did not warrant dismissal. However she blew it out of proportion by becoming rude and disrespectful to her seniors even during the disciplinary hearing and as such the decision to dismiss her was reached.

6. After careful consideration of the material presented to the court, I find that the claimant has failed to prove on a balance of probability that her dismissal was unlawful and unjust. The dismissal letter dated 19.7.2013 identifies three offences committed by the claimant including: failure to wear Nametag and eating from the reception area on 5.6.2013; and unbecoming misconduct of arrogance during the disciplinary hearing and failure to sign a warning letter on 15.7.2013.

7. The claimant has maintained that the offence allegedly committed on 5.6.2012 is not true because according to the visitor book (gate Register) produced, the Sales Manager visited the claimants workplace on 4.6.2013. She however did not deny that the offence of arrogance and insubordination on 15.7.2013. Consequently I find that the respondent has proved on a balance of probability that the dismissal of the claimant was lawful and justified because on 15.7.2013 she in subordinated the General Manager through her arrogance and refusal to sign a warning letter. The court therefore makes a finding of fact and law that the dismissal of the claimant from employment was lawful and justified.

Reliefs

Notice and compensation

8. In view of the finding above that the termination was lawful and justified, I dismiss the claim for salary in lieu of notice and compensation for loss of employment.

Service pay

9. The claimant cannot benefit from service pay after receiving service gratuity from the employer. Section 35 (5) of the Employment Act bars an employee from claiming service pay if the employer has provided a lawful form social security to him. The claimant has not denied that she was paid kshs.31,230 as gratuity for 5 years service.

Overtime

10. The respondent was paid for over time worked according to the calculation produced by the defence. The claimant has not denied that she received kshs.274,314.60 as overtime for the whole period of his service. Consequently, I dismiss the claim for overtime pay for lack of merits, and also because the claimant provided no particulars of the claim and evidence to prove it.

House Allowance

11. The claimant prays for kshs.110,022 as her unpaid House Allowance for 5 years 6 months. She has however not shown how she has arrived at that figure. No evidence or submissions were led to prove that claim and therefore I dismiss it.

Leave fees, Private leave and Leave travelling allowance

12. The claimant prays for kshs.38905, kshs.5,225 and kshs.3,891 as Leave fees for 5 years, Leave

travelling allowance for 5 years and Private leave of 6 months. No particulars or basis in law or contract was shown to warrant the award of the said dues. I therefore dismiss the same for lack of merits.

Salary for July 2013

13. The claimant prays for salary for July 2013 being kshs.11,115.70. The respondent has not proved that she paid her the salary for the 18 days worked in July 2013. I therefore award to the claimant kshs.7,695.50 as the salary for the 18 days worked in July 2013.

Disposition

14. For the reasons stated above, I enter Judgment for the claimant by awarding her **kshs.7,695.50** plus interest from July 2013 until payment in full. No orders as to costs.

Signed, dated and delivered at Mombasa this 2nd day of December 2016.

O.N. MAKAU

JUDGE